APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1530

FAYETTEVILLE AREA CHAMBER OF COMMERCE, *Plaintiff*
INTERSTATE 95 COMMITTEE, *Appellant*

v.

JOHN A. VOLPE, individually and as Secretary of Transportation; F. C. TURNER, individually and as Federal Highway Administrator; and RALPH R. BARTELSMEYER, individually and as Director of Public Roads; and STATE HIGHWAY COMMISSION, *Appellees*

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. F. T. Dupree, District Judge.

Argued December 5, 1974 Decided May 5, 1975

Before BOREMAN, Senior Circuit Judge, FIELD and WIDENER, Circuit Judges

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WIDENER, Circuit Judge:

This case comes to us after remand in 463 F.2d 402 (4th Cir. 1972).[1]

When the matter was first here, we partially affirmed and remanded for further consideration and such proceedings as might be necessary with respect to two specific facets of the case: (1) the filing of an environmental impact statement (EIS) under the National Environmental Policy Act of 1969 (NEPA), 42 USC § 4332(2)(C), and (2) compliance with a part of the Federal-Aid Highways Act, 23 USC § 128(a). NEPA was enacted after this highway project was well along, and, in the first appeal of this case, it was conceded that an environmental impact statement should have been prepared and circulated in conjunction with the approval of the bypass routing. Also, after the project had commenced and public hearings had been held, 23 USC § 128(a) was amended.[2] As initially applied to this bypass, § 128(a) required public hearings and consideration of the economic effects of the location of the bypass. As amended in 1968, additional information to be sought at such hearings is that to aid in the required certification indicating the consideration of the social effects of the proposed location, its impact on the environment, and its consistency with the particular community's urban planning and goals. A 1970 amendment provided for report

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[1] We note we have received an unsolicited *ex parte* communication giving the results of what was apparently a local poll on the location of the bypass. Of course it was not considered in arriving at our decision.

[2] We held in *Arlington Coalition on Transportation* v. *Volpe*, 458 F2d 1323 (4th Cir. 1972), that 42 USC 4332(C) and 23 USC § 128(a) as amended in 1968 might apply to ongoing highway projects. The provision providing for a report on the consideration given alternatives is not a part of the 1968 amendment to § 128(a), but is § 135(a) of PL 91-605 of the Federal Aid Highway Act of 1970, the 1970 amendment to § 128(a).

of various alternatives raised during the hearing or which were otherwise considered as well as other matters.

The plaintiffs-appellants contend that the preparation of environmental impact statements is a non-delegable duty which must be performed solely by a responsible federal agency and, assuming such is not the case, participation in the preparation of the EIS by the North Carolina Transportation Department is impermissible because the head of the department was committed to the bypass location; that the approval of the final EIS by the U. S. Department of Transportation was not based on substantial good faith review; that an alternate route did not receive proper consideration; and that their request for an evidentiary hearing should have been granted in order to prove the decision of the U. S. Department of Transportation on the bypass route was arbitrary and not in accordance with law. We do not accept these contentions and affirm.

A more detailed statement of the background of the case is made in our first opinion, 463 F.2d 402. Following remand, the district court, by a series of orders commencing on August 20, 1972, properly insured that the remand was complied with.

A draft EIS had been commenced prior to the remand, the appropriate state and federal authorities co-operating in its preparation. The first draft was dated December 29, 1971, and was cleared for circulation January 3, 1972. Following the orders of the district court, a revised draft impact statement was prepared and cleared for circulation in May 1973. It was filed with the district court May 15, 1973 and was available at the public hearing subsequently referred to.

After the revised draft environmental impact statement had been circulated and filed with the district court, and after due public notice, a public hearing was held on July 16, 1973. This was a combined design and location hearing.

At this hearing, everyone interested was given the opportunity to present his views concerning the design and location of the bypass and also the environmental and other effects. Included among the witnesses at the public hearing were two experts offered by the plaintiffs who gave evidence concerning environmental and economic aspects of "the highway project in question." The hearing was attended not only by responsible officials of the State Highway Department but also by the division engineer and area engineer of the Federal Highway Administration and its regional attorney. At the hearing, a full airing of the bypass route and two alternate routes following U. S. 301 was had.[3]

Following the public hearing, opportunity was given to supplement the record, and the plaintiffs availed themselves of this opportunity.

The State Highway Department completed its work on the final EIS and submitted it to the Federal Highway Administration on August 24, 1973, and on that date the division office of the Federal Highway Administration submitted the statement to its regional office. The regional office accepted the statement on August 27, 1973 and forwarded it to its Washington office, where the final statement was accepted on August 30, 1973 and transmitted to the Department of Transportation. The Department of Transportation accepted the final statement on September 17, 1973 and transmitted it to the Council on Environmental Quality on that date. The required 30-day waiting period having expired, the bypass location, on request, was approved by the Department of Transportation on October 20, 1973.

The district judge had before him the entire administrative record when he considered the defendants' motion for summary judgment. The action of the district judge in re-

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[3] The record also shows the federal and state authorities considered two variations of each of the two U.S. 301 alternate routes. So, in fact, at least six alternatives were considered, including a "do nothing" alternative.

quiring the full record was in accordance with the decision in *Citizens to Preserve Overton Park* v. *Volpe*, 401 US 402 (1971), "that review is to be based on the full administrative record that was before the Secretary at the time he made his decision." 401 US 402, 420. In a memorandum decision, the district court correctly stated the standard of review as follows:

> "... the court has made a 'thorough, probing, in-depth review' of the additions made to the administrative record submitted by the defendants subsequent to remand as required by *Overton Park*, supra; it has reviewed the agency decisions on the merits to determine if they are in accord with NEPA as required by *Conservation Council of North Carolina* v. *Froehlke*, 473 F.2d 664 (4th Cir. 1973), and *Appalachian Power Company, et al* v. *Environmental Protection Agency*, 477 F.2d 495 (4th Cir. 1973); and has undertaken to determine if the Secretary of Transportation inadequately explained his decision, all with the view to determining whether the decision was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'. *Camp* v. *Pitts*, 411 US 138, 142 (1973)." (footnote 1 omitted)

At this point, we note that in *Camp* v. *Pitts*, 411 US 138 (1973), the court has stated that in applying the standard of review set out in 5 USC § 706(2)(A) "... the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." 411 US 138, 142 (1973).

The claim that the federal and state cooperation in the preparation of the environmental impact statement was an impermissible delegation of authority on the part of the Federal Highway Administration is not well taken. The statute, 42 USC 4332(C), requires "a detailed statement by the responsible official." Even before the decision of this

court in *Arlington Coalition on Transportation* (it being remembered that NEPA was enacted subsequent to the initial public hearings in this matter), the responsible federal officials, in conjunction with the state officials, had commenced the preparation of a draft impact statement, and the continued cooperation, commencing in 1971, of state and federal authorities in the preparation of the first and second draft environmental impact statements and the final statement is supported by the record. Not only did the federal officials review with care from time to time the work on the preparation of the statement, the physical preparation of which was largely handled by the state authorities, the record also includes such activity by the federal officials as field inspections, erosion control recommendations, directions to the state to include appropriate consideration of the comments from the Council on Environmental Quality, joint meetings to determine the design concept, and progress meetings to review the draft statement. And we do not mention here most of the matters of detail which the record shows were jointly considered by the state and federal authorities in deciding upon the location and design of the Fayetteville bypass, as well as the preparation of the environmental impact statement.

While it is true that it has been held that if the EIS were only "reviewed as to form" by the responsible federal agency, see *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 412 (2nd Cir. 1973), the preparation of the report in its entirety by a delegate of the federal agency might fatally infect the agency action complained of, such question is not before us.[4] The district judge found good faith participation by responsible federal

[4] Some language in *Iowa Citizens for Environmental Quality* indicates that if the question in *Greene County* were squarely put, the decision of the court might not be the same as the Second Circuit. See esp. p. 854-5 and n. 3. We note this to emphasize we express no opinion on the question of delegation on the facts of the *Greene County* case.

officials in the preparation of the two draft environmental statements and the final EIS, and our examination of the record confirms his finding. The record discloses a joint participation by federal and state officials in the bypass project and in the preparation of both draft statements and the final EIS, even to matters of such nice minor detail as the location of graves. Two circuits at least have considered this question with respect to the Federal-Aid Highways Act and compliance with it under Department of Transportation Policy and Procedure Memorandum 90-1, 23 CFR, Part I, Appendix A, and found environmental impact statements for the location of federal-aid highways sufficient when prepared under like circumstances. In *Iowa Citizens for Environmental Quality, Inc.* v. *Volpe;* 487 F.2d 849 (8th Cir. 1973) (one judge dissenting), with a fact situation very nearly identical to that existing here, the court approved an EIS by the Iowa highway department prepared under Memorandum 90-1 as above mentioned. On similar facts, in *Citizens Environmental Council* v. *Volpe,* 484 F.2d 870 (10th Cir. 1973), a unanimous court approved an EIS where the "Secretary of Transportation did not simply 'rubber stamp' the State's work. He reviewed it and adopted it as its own." In *Life of the Land* v. *Brinegar,* 485 F.2d 460 (9th Cir. 1973), the court approved an EIS physically prepared by a private consulting firm at the instance of the Federal Aviation Agency, when ". . . agency officials actively participated in all phases of the EIS preparation process." 485 F.2d 460, 467. And, in our circuit, the District of Maryland, in *Movement Against Destruction* v. *Volpe,* 361 F.Supp. 1360 (D. Md. 1973), aff'd. per curiam, No. 73-2136 (4th Cir. 1974), approved an environmental impact statement against the argument that it should not have been drafted by the Interstate Division of Baltimore City, a division of the State Highway Administration of Maryland. The court there found that responsible federal authorities had participated in the preparation of the statement through the federal district engineer and had monitored the development of plans for an expressway for three

years. Parenthetically, we note that the Federal Highway Administration has been involved in almost every aspect of the Fayetteville bypass since at least 1964.

The allied complaint, that, if there is no impermissible delegation, the participation in and physical preparation of the EIS by the North Carolina authorities is none the less not allowable, is likewise not well taken. It is well to note here that the bypass location for the road had been fixed after public hearings even before the passage of NEPA, much less the amendments of 23 USC § 128(a) in 1968 and 1970. Someone has to approve the route of every highway. In the case of federal-aid highways, the initial decision is made by the responsible state authorities subject to approval by the federal authorities. This is precisely what was done in this case. The fact that a state highway official has made an administrative decision as to the location of a federal-aid highway does not disqualify his department from taking part in the preparation of an environmental impact statement. In the face of similar objections, the Ninth Circuit, in *Life of the Land,* and the Eighth Circuit, in *Environmental Defense Fund* v. *Corps. of Engineers, U. S. Army,* 470 F.2d 289 (8th Cir. 1972), have indicated that test of compliance with § 102 of NEPA, 42 USC § 4332, "is one of good faith objectivity rather than subjective impartiality." 470 F.2d 289, 296. We adopt this reasoning.

Nothing in the record suggests other than good faith objectivity on the part of any official, state or federal. The fact that they have come to different conclusions than the plaintiffs desire is no reason to upset their decision.

We are thus of opinion that where responsible federal and state officials participate in the preparation of an environmental impact statement for a federal-aid highway, the statement being prepared in accordance with the applicable statutes and regulations as in the case here, there has been no violation of 42 USC § 4332(C) because of participation by the state officials.

The contention that the approval by the Department of Transportation of the final EIS was not based on substantial good faith review has been largely covered in the discussion just above. Suffice it to say here that when the federal officials have actively participated in the preparation of the statement, it is hardly possible to claim they have not reviewed it. In all events, the record supports a detailed review as well as participation. If the claim may be taken to mean any lack of good faith, the record is simply devoid of the slightest evidence to support it.

The next claim of the plaintiffs is that a third alternative route was considered by the State Highway Department and not submitted to the federal authorities. They say that this violates 42 USC § 4332(C)(iii) and also 23 USC § 128(b) [5] Section 4332(C)(iii) provides that a statement on alternatives to the proposed action be included in the EIS. Section 128(a) provides that the state should report to the federal authorities various alternatives which were raise dduring the public hearing or which were otherwise considered.

Some time after the public hearing of July 16, 1973, a person described by the appellants as a respected, technically qualified, and long-time resident of Fayetteville submitted to the State Highway Department an alternate route to either the bypass or the U. S. 301 location. At this point, it should be remarked that the routes considered at the public hearing were the bypass which was ultimately approved, two U. S. 301 routes, and a "do nothing" alternative, which would mean not building the road at all.[6] See PPM 90-1, App. 3, para. 2(d). The proposed intermediate location would have gone between the bypass route, which went as far as five miles from the city, and the U. S. 301

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[5] 42 USC § 4332(D) also concerns alternatives.

Actually, 23 USC § 128(a) requires the report on the consideration of alternatives. Section 128(b) requires a copy of the transcript of the public hearing to be submitted to the Secretary.

[6] See footnote 3, p. 6.

route. Exactly when this proposal was made by the citizen to the State Highway Department is not shown by the record. It was discussed in an internal memorandum within the State Highway Department dated September 21, 1973, which refers to an aerial mosaic submitted September 5, 1973, which is the first date in the record referring to the intermediate route. So, a fair assumption is the suggestion was made to the State Highway Department during the first few days in September. In all events, we know that the citizen, although a resident of Fayetteville, did not bring the matter up in the public hearing on July 16, 1973, when the very subject of his suggestion was being publicly discussed at a meeting called for that purpose. The State Highway Department did as it should have done and examined the suggestion on its merits. It concluded, in the internal memorandum, as compared with the bypass route, the intermediate route had one advantage as against 13 disadvantages and recommended that it not be given further consideration. In addition to the enumerated disadvantages, the intermediate suggestion would have meant a delay of about four more years in a project which at that time had already suffered delays from the public hearings of 1966 until 1973. No cases are found construing the provision for the consideration of alternatives in 23 USC § 128(a). Section 4332(C)(iii), in its provision for alternatives, has been considered in *Life of the Land, Iowa Citizens for Environmental Quality,* and *Natural Resources Defense Council* v. *Morton,* 458 F.2d 827 (D.C. Cir. 1972), and *Environmental Defense Fund* v. *Corps of Engineer, U. S. Army.* Sometimes the review has been phrased as going to subsection (D) of the statute rather than (C)(iii), but always construing the provisions as to alternatives. In this circuit, *Movement Against Destruction* has considered the same matter. All these cases construe the provisions for consideration and discussion of alternatives as subject to a construction of reasonableness. We see no reason the similar provisions of § 128(a) should not be construed the same, and we so con-

strue them. The gist of all of the opinions is that an infinite variety of alternatives is permissible in almost every administrative decision of this nature, which should be especially true here when it is considered that the administrative authorities have considered a "do nothing" alternative. This being so, there must be an end to the process somewhere or no federal-aid highway would ever be built. So long as there are unexplored and undiscussed alternatives that inventive minds can suggest, without a rule of reason, it will be technically impossible to prepare a literally correct environmental impact statement and literally impossible for a state highway department to report, in compliance with § 128(a), the final decision on the route of a federal highway to the federal authorities. We think that what NEPA, 42 USC § 4332(C)(iii), demands is the "study, development, and description of reasonable alternatives," *Environmental Defense Fund* v. *Corps of Engineers, U. S. Army,* at p. 297, that is to say, "realistic alternatives that will be reasonably available within the time the decision making official intends to act." *Movement Against Destruction,* at p. 1388. We think the language from *Natural Resources Defense Council,* approved in *Iowa Citizens for Environmental Quality,* should be applicable here to the alternative provisions of § 128(a) and § 4332(C)(iii) alike: "... if this requirement is not rubber, neither is it iron. The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research—and time—available to meet the Nation's needs are not infinite." 487 F.2d 849, 852. If the state highway authorities in this case had summarily rejected the suggestion for the intermediate route made by the citizen who did not bring up his suggestion at the public hearing, it might very well be accused of being arbitrary. And, having considered the suggestion, and concluded that its numerous disadvantages as weighed against its one advantage over the route chosen, coupled with a four-year time delay in an

already delayed project, caused it not to warrant further consideration, it was quite within the bounds of reason for the suggestion not to be reported to the federal highway authorities under § 128(a) and not to be discussed in the final draft of the EIS (even if it were received by the state authorities in time to do so, which is doubtful).

Plaintiffs' request for an oral hearing, which was denied by the district court, is also without merit. The district court had before it the full administrative record. The record discloses the factors which were considered by the Department of Transportation in the approval of the route and in the submission of the environmental impact statement. All of the matters requiring consideration by 42 USC § 4332(C) were considered by the Secretary. The only concrete argument the plaintiffs make for granting an oral hearing is that the Secretary has not agreed with the conclusions reached by their expert witnesses. The most that can be said for their position is that the federal authorities did not agree with the conclusions reached by the plaintiffs' witnesses. No reason is given to justify departure from the standard laid down in *Camp* v. *Pitts* that ". . . the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." No fact is called to our attention to show the Secretary did not "act within the scope of his authority" or that his action was not "justifiable under the applicable standard." *Citizens to Preserve Overton Park,* p. 420.

All in all, we are of opinion the actions of the Secretary with respect to the location of the Fayetteville bypass were neither arbitrary nor capricious nor an abuse of discretion, nor otherwise not in accordance with law; rather, they were studied, deliberate, well within his discretion, and in accordance with the applicable statutes and regulations.

Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1530

FAYETTEVILLE AREA CHAMBER OF COMMERCE, *Plaintiff*,
INTERSTATE 95 COMMITTEE, *Plaintiff-Appellant*,

v.

JOHN A. VOLPE, Individually and as Secretary of Transportation, F. C. TURNER, Individually and as Federal Highway Administrator, and RALPH R. BARTELSMEYER, Individually and as Director of Public Roads, and State Highway Commission, *Appellees*.

Appeal from the United States District Court for the Eastern District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration thereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

Filed May 5, 1975

/s/ WILLIAM K. SLATE, II
William K. Slate, II
Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

Civil No. 933

FAYETTEVILLE AREA CHAMBER OF COMMERCE and INTERSTATE 95 COMMITTEE, *Plaintiffs*

vs.

JOHN A. VOLPE, Individually and as Secretary of Transportation; F. C. TURNER, Individually and as Federal Highway Administrator; and RALPH R. BARTELSMEYER, Individually and as Director of Public Roads; and STATE HIGHWAY COMMISSION, *Defendants*

Memorandum of Decision

In this action the plaintiffs, Fayetteville Area Chamber of Commerce and the Interstate 95 Committee, seek judicial review of the selection and approval of the defendants of a by-pass location of Federal Interstate Highway Route 95 around Fayetteville, North Carolina. Jurisdiction is laid under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702. In their complaint filed almost six years ago plaintiffs alleged that the approval by the defendants of a by-pass location rather than aligning the proposed new interstate highway along existing U. S. Highway 301 thus bringing it within the eastern city limits of Fayetteville was arbitrary, capricious and otherwise not in accordance with law. This court, following what is perceived to be the standard for judicial review in such cases as outlined in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971), conducted a "thorough, probing, in-depth review" of the administrative record submitted by the defendants and concluded that the action of the defendants

in approving the by-pass location and rejecting the proposal of the plaintiffs was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law, and the motion of defendants for summary judgment was therefore allowed.

On appeal to the Court of Appeals for the Fourth Circuit this court's conclusion based on the administrative record as it then existed was approved, but in view of two developments in the law subsequent to the compilation of that record, the case was remanded to this court pending compliance by the Secretary of Transportation with the requirements of Section 102(c) of the National Environmental Policy Act, 42 U.S.C. § 4332(c), and Section 128 (a), as amended, of the Federal-Aid Highways Act, 23 U.S.C. § 128(a). Although enacted long after defendants' initial approval of the by-pass location, these statutes were held to apply retrospectively to an ongoing highway project in *Arlington Coalition on Transportation, et al.*, v. *Volpe*, 458 F.2d 1323 (4th Cir. 1972), if the project has not reached a stage of completion at which it would be economically feasible to alter or abandon the project's proposed location. This court was directed to retain jurisdiction "until such time as the Secretary satisfies [the] court that there has been full compliance with the requirements of Section 102(c)". The court was further directed to conduct "such further proceedings as may be necessary in light of the decision in *Arlington* and the views herein expressed".

The Secretary, apparently anticipating the Fourth Circuit's ruling in *Arlington* of the necessity of his compliance with NEPA, had already taken steps to have an Environmental Impact Statement (EIS) prepared prior to the remand of the case to this court by the Fourth Circuit, and following remand a final EIS was prepared, circulated and approved by all interested parties. Adhering to a time schedule established by this court, the North Carolina

State Highway Commission (now the Division of Highways, Department of Transportation and Highway Safety) conducted a further public hearing on July 16, 1973, for the purpose of complying with Section 128(a), as amended, of the Federal-Aid Highways Act. Thereafter the State authorities reaffirmed the by-pass location for I-95, and made a summary report to the United States Secretary of Transportation in compliance with the applicable regulations on October 5, 1973, requesting that the Federal Highway Administration reaffirm its approval of the by-pass location. On October 24, 1973, the division engineer for the Department of Transportation, Federal Highway Administration, wrote to the North Carolina State Highway Administrator, Division of Highways, as follows:

> "We have completed our review of the summary report transmitted with your letter dated October 5, 1973. We have previously reviewed the other documents submitted as required by PPM's 20-8 and 90-1 and now consider that the necessary requirements have been met.
>
> "We hereby reaffirm the corridor location approval originally given by Mr. F. C. Turner on March 21, 1968, and approve the design of the project."

Following this second approval of the I-95 by-pass location the defendants renewed their motion for summary judgment to which the plaintiffs filed responses bringing under attack the attempted compliance by defendants with the requirements of NEPA and Section 128(a) of the Federal-Aid Highways Act. It is this motion which is now before the court for decision.

Although the matter has been argued at length on two occasions by able counsel for plaintiffs and defendants, counsel are still not able to agree upon the appropriate standard of judicial review which should be employed in cases such as this. With due deference this court is con-

strained to observe that the decisions to which it has been obliged to refer for guidance have not always been models of clarity. In the following discussion of the actions taken by the defendants to comply with the Fourth Circuit's directives on remand this court has concluded to examine the actions of the defendants in the light of all the standards of review of which it is aware. Accordingly, the court has made a "thorough, probing, in-depth review" of the additions made to the administrative record submitted by the defendants subsequent to remand as required by *Overton Park,* supra; it has reviewed the agency decisions on the merits to determine if they are in accord with NEPA as required by *Conservation Council of North Carolina* v. *Froehlke,* 473 F.2d 664 (4th Cir. 1973),[1] and *Appalachian Power Company, et al.,* v. *Environmental Protection Agency,* 477 F.2d 495 (4th Cir. 1973); and has undertaken to determine if the Secretary of Transportation inadequately explained his decision, all with the view to determining whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". *Camp* v. *Pitts,* 411 U.S. 138, 142 (1973).

The Environmental Impact Statement

The plaintiffs have mounted a two-pronged attack on the EIS contending first that the Secretary exceeded his statutory authority by permitting the EIS to be prepared by the North Carolina Transportation Department rather than preparing it himself and second, that the EIS as prepared does not adequately comply with the requirement of Sec-

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[1] To what extent, if at all, this decision was rendered "inoperative" by *Camp* v. *Pitts,* 411 U.S. 138 (1973), is unclear. See *Conservation Council of North Carolina* v. *Froehlke,* No. 73-8095 decided November 20, 1973. That there is disagreement among the circuits as to the appropriate standard of review is illustrated by *National Helium Corporation* v. *Morton,* 486 F.2d 995, 1006 (10th Cir. 1973).

tion 102(2)(c)(iii) of NEPA that "alternatives to the proposed action" be included therein.

In support of their first point plaintiffs have cited and relied on *Greene County Planning Board* v. *Federal Power Commission*, 455 F.2d 412 (2nd Cir. 1972), *cert. denied*, 409 U.S. 849, and *Conservation Society of Southern Vermont* v. *Secretary of Transportation*, 362 F.Supp. 627 (D.Vt. 1973). With these two exceptions all of the cases dealing with the delegation of EIS preparation to an outside agency have permitted such delegation where the federal agency significantly participated in the preparation of the EIS. See, for instance, *Finish Allatoona's Interstate Right, Inc.*, v. *Volpe*, 355 F.Supp. 933 (N.D. Ga. 1973), aff'd., — F.2d — (5th Cir. 1973), and *Life of the Land* v. *Brinegar*, 485 F.2d 460 (9th Cir. 1973). In *Life of the Land* it appeared that the EIS was prepared by a private engineering consulting firm which had a financial interest in an affirmative decision on the proposed project, but in view of evidence of significant participation by the federal agency in the preparation of the EIS, delegation of the EIS preparation was held not to be improper or illegal. The *Greene County* and *Conservation Society of Southern Vermont* cases were distinguished on the grounds that in those cases the federal agency had "abdicate[d] a significant part of its responsibility" to another organization.[2]

In the case at bar the record indicates good faith participation by responsible federal officials in the preparation of two draft environmental statements and the final EIS. More importantly, an examination of these quite bulky documents has convinced the court that not only were all the

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[2] It should be noted that Vermont District Court in *Conservation Society* found the EIS prepared by the Vermont Highway Department "in substance not to have been biased" and that it demonstrated (with one exception not pertinent here) "good faith consideration of the environmental values involved . . ." 362 F.Supp. 627, 633.

required procedural steps followed by the state and federal agencies but that both the state and federal defendants considered all relevant factors in reaching decision and that the decision did not represent "a clear error of judgment". A full articulation of the reasoning of the state and federal agencies is contained in the EIS in connection with its treatment of each of the five requirements of NEPA.[3]

The court is likewise not impressed with plaintiffs' argument that the EIS did not adequately cover "alternatives to the proposed action" as required by Section 102(2)(c)(iii) of NEPA. The basis for the argument is the assertion in plaintiffs' supplemental answer to defendants' motion for summary judgment that a plan for "an intermediate location" was submitted to the State Highway authorities "by a respected, technically-qualified and long-time resident of Fayeteville, who was not aligned with the plaintiffs in this case" and that although this alternative plan was considered by the state before the United States Department of Transporation gave is approval, "neither the report required under 23 U.S.C. § 128(b) nor the Environmental Impact Statement made any mention of it".

That this alternative proposal was indeed considered by the North Carolina Division of Highways is established by a detailed memorandum from its Planning and Research

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[3] 42 U.S.C. § 4332(2)(c) provides that the EIS must include:

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environmental and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

Branch to the State Highway Administrator dated September 21, 1973[4] attached as an exhibit to plaintiffs' supplemental answer. In this memo the proposed intermediate location was compared in detail with the by-pass location approved by the defendants and the U. S. 301 alignment proposal favored by the plaintiffs. As against the by-pass location it was found to have one advantage (reducing the effect on wildlife) and thirteen disadvantages many of which were environmentally related. As against the U.S. 301 alternative it was found to have six advantages and two disadvantages, one of each being environmentally related.

It is perfectly obvious that regardless of when this alternative proposal was first received and considered by the state officials, its inclusion in the EIS would have served only to increase the size of that already voluminous document and that it could in no way have altered the conclusions reached therein on alternatives. The same is true of the failure to mention the "intermediate location" proposal in the report made by the state under 23 U.S.C. § 128(b). As was said in *Life of the Land, supra,* 485 F.2d 460, 472,

> "NEPA's 'alternatives" discussion is subject to a construction of reasonableness. *N.R.D.C., Inc.* v. *Morton, supra,* 458 F.2d at 834. Certainly, the statute should not be employed as a crutch for chronic fault-finding. Accordingly, there is no need for an EIS to consider an alternative whose effect cannot be reasonably ascertained, and whose implementation is deemed remote and speculative."

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[4] The record does not indicate when this alternative plan was received by the Division of Highways. On oral argument counsel for this defendant indicated that it was not available at the time of the public hearing on July 16, 1973, while counsel for the plaintiffs stated that he was in position to show that it was received by the state officials prior to that date. In the view the court takes of the matter, this is immaterial.

COMPLIANCE WITH 23 U.S.C. § 128(a) AS AMENDED

The second purpose to be served by the Fourth Circuit's remand of the case to this court was to permit compliance with 23 U.S.C. § 128(a) relating to public hearings with respect to the route of a proposed federal-aid highway. At the time of the first public hearing in this case in 1966 Section 128(a) required only that information be amassed at the hearing to aid in the consideration of the economic effects of the locations under consideration. Effective August 23, 1968, which was after the institution of this action, Section 128(a) was amended to provide that additional information must be sought at such hearings to aid in the consideration of the social effects of the proposed location, its impact on the environment, and its consistency with the particular community's urban planning objectives and goals. In order to comply with these new requirements the state authorities after due advertisement conducted a further lengthy public hearing on July 16, 1973, at which the plaintiffs were represented by counsel and offered expert testimony. A lengthy transcript of that hearing has been filed as part of the administrative record in this court and has been reviewed.

Despite the claim of plaintiffs in their brief that the record in this case "is little short of a complete disaster", the court finds that it is on the contrary quite complete and by no means "a disaster". It will be recalled that the Fourth Circuit has already found the record in this case to contain ample evidence that the Secretary gave adequate consideration to local needs, the possible use of existing Highway 301 as an alternate route and the possible economic impact on the local economy resulting from the by-pass location of I-95. This court now finds that the July 16, 1973 hearing fully covered the social effects of the proposed by-pass location, its impact on the environment and its consistency with the community's urban planning objectives and goals.[5]

[5] Also covered at this hearing was the matter of the design of the proposed location as required by the Department of Transporta-

Central to the plaintiffs' argument as to the alleged inadequacy of the record is the contention that it is "devoid of any evidence of how the federal officials considered and resolved any of the many controversial issues." The court is of the opinion, however, that the record fully discloses the factors which were considered by the federal officials, and even if it can be said that they did not explain in detail the reasons for their decision approving the actions of the state officials following remand, the determinative reason for the action taken is perfectly apparent: In addition to the reasons fully explicated for his initial approval of the by-pass location in 1968 (which counsel for plaintiffs on oral argument at the most recent hearing praised for their comprehensiveness) the Secretary (acting through his subordinates) has now found the EIS and the record of the second public hearing to be fully supportive of the initial decision. That brevity in the expression of administrative decision is not fatal is illustrated by *Camp* v. *Pitts,* supra at page 143, and that inquiry into the mental processes of administrative decision-makers is usually to be avoided is another teaching of *Overton Park,* supra.

The conclusion is that the Secretary's decision in this case is fully sustainable on the entire administrative record as it now exists, and it follows that defendants are again entitled to allowance of their motion for summary judgment. Judgment will be entered accordingly.

/s/ F. T. DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

February 1, 1974.

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tion's policy and procedure memorandum 20-8. Plaintiffs have raised no question as to the adequacy of the hearing for this purpose.

APPENDIX D

1. Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, provides in relevant part:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—
>
> > (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
> >
> > > (i) the environmental impact of the proposed action,
> > >
> > > (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> > >
> > > (iii) alternatives to the proposed action,
> > >
> > > (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> > >
> > > (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and en-

force environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop and describe appropriate alternatives to recommend courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

2. The Federal-Aid Highways Act, 23 U.S.C. 128(a) provides as follows:

Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway. Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered.

APPENDIX E

STATE OF NORTH CAROLINA
DEPARTMENT OF TRANSPORTATION AND HIGHWAY SAFETY
RALEIGH 27611

Division of Highways

James E. Holshore, Jr.
Governor
Bruce A. Lentz
Secretary

September 21, 1973

MEMORANDUM To: Mr. Billy Rose

FROM: Planning and Research Branch

SUBJECT: I-95 Fayetteville, "Intermediate Location"

As per your direction, this Branch in cooperation with the Roadway Design Unit has investigated the feasibility of the above subject. The accompanying aerial mosaic, showing approximate centerline and right of way requirements, was prepared and utilized in this investigation. The corridor shown on the map is essentially the same corridor which you submitted on the blue print aerial mosaic on September 5, 1973.

The project proposed for this corridor was divided into three parts and is described as follows:

Section 1—from a point on existing I-95 near Roslin, along existing US 301 to a point near SR 2219, a distance of 4.6 miles (not shown on aerial mosaic).

Section 2—the relocation portion from US 301 near SR 2219, northeasterly to a point on existing US 301 near SR 1725, a distance of 9.7 miles (shown on aerial mosaic).

Section 3—Safety project portion from US 301 near SR 1725 north along US 301 & I-95 to a point on existing I-95 near Eastover, a distance of 2.8 miles (not shown on aerial mosaic).

The design proposed for Section 1 would be as proposed under Scheme I of the US 301 Alternative, i.e. a 70 MPH design speed, 68 ft. median, 6 lanes with 10 ft. paved outside shoulder and 4 ft. paved inside shoulder, and frontage roads on both sides. Diamond interchanges would be constructed at SR 2242 (near Roslin) and NC 59. The existing US 301 Flyover would be removed. The interchange at SR 1363 included in the US 301 Alternative would not be included under the "intermediate" location due to the proximity to the flyover where the relocation begins.

The design for Section 2 (Relocation) consists of 4 lanes with 10 ft. paved outside shoulders and 4 ft. paved inside shoulders and a 68 foot median. Frontage roads are not proposed. Freeway to freeway interchanges are proposed at Airport Road-Future Owen Drive, NC 87-CBD Loop and NC 24 Relocated. Directional flyover interchanges are proposed at US 301 on the north and south ends of the relocated section. Separations without access are proposed at Airport Connector (SR 2282), Wilkes Road (SR 2210), South King Street, Deep Creek Road, NC 53-210, NC 53-210, NC 24 (existing), Plymouth Street and Dunn Road (SR 1833). Also, structures will be required to carry the project over the Cape Fear Railroad, Cape Fear River, Seaboard Coast Line Railroad and Locke's Creek.

The design on Section 3 would be the same as proposed under the US 301 Alternative, consisting of a safety project. This would upgrade the existing four lane freeway by adding 10 ft. paved outside shoulders and 4 ft. paved inside shoulders, a 30 ft. clear area, breakaway signs, etc. A project of this type is deemed necessary by FHWA regardless of the location of I-95. Therefore, FHWA would not allow its cost to be included in comparisons of alternatives.

Preliminary cost estimates and number of relocation based on a field count for sections 1 and 2 are as follows:

Cost		Relocations	
Construction		Residential	464
Roadway	$40,000,000	Businesses	45
Structures	$14,000,000	Manufacturing Plants	2
Right-of-Way	$16,000,000	Non Profit	
Lighting	$ 2,000,000	Organizations	9
Total	$72,000,000	Total	520

This corridor location has certain advantages and disadvantages compared with the US 301 location and the bypass location.

"Intermediate" vs. "Bypass"

Advantages of "Intermediate" Alignment

(1) Does not take as much rural land or divide large wooded tracts suitable for wildlife habitat.

Disadvantages of "Intermediate" Alignment

(1) Takes considerably more residences, businesses and nonprofit organizations

(2) Cost considerably more to construct lesser length of highway

(3) Requires relocation of approximately 75 graves from McFaden Cemetery and Rockfish Memorial Park

(4) Maintenance of traffic would be more difficult (on Section 1 and Section 3).

(5) It is not in conformance with Cumberland County planning efforts.

(6) Does not meet national noise standards of PPM 90-2.

(7) Divides and destroys integrity of minority neighborhood near Old Wilmington Road.

(8) Divides and destroys integrity of Vineland Park subdivision near SR 2291.

(9) Requires complicated interchange design at Airport Road-Future Owen Drive and NC 87-Future CBD Loop due to proximity to US 301. US 301 will have to be separated without access (to Future Owen Drive and future CBD Loop) thereby, restricting local traffic service.

(10) Requires extensive fill and channel change in the Locke's Creek flood plain between NC 24 and Dunn Road (SR 1838).

(11) Takes part of riverport terminal and restricts future expansion of facilities to the north.

(12) Greater impact on Fayetteville and Cumberland County tax base.

(13) Greater effect on social institutions in that it would take 4 churches, boy scout and cub scout facilities, a social club and portion of two cemeterys.

"Intermediate" vs. "US 301 Alternative"

Advantages of "Intermediate" Alignment

(1) Cost less to construct longer length of roadway.

(2) Requires less time to construct (estimated 4 years for right of way acquisition and 4 years for construction).

(3) Eliminates section 4(f) consideration of Pope Park.

(4) Eliminates complicated interchange at Gillespie Street-W. Hudson Street.

(6) Considerably reduces traffic handling problem during construction.

Disadvantages of "Intermediate" Alignment

(1) Requires separate airport connector from US 301 due to interchange at Airport Road-Future Owen Drive.

(2) Divides and destroys integrity of Vineland Park and minority neighborhood near Old Wilmington Road.

Consideration and approval of an intermediate corridor location would require the following time schedule to reach the point where the "bypass" corridor stands at present.

July 1, 1974	Preliminary design complete
January 1, 1975	Draft EIS complete
February 1, 1975	Corridor public hearing held
April 1, 1975	Final EIS complete
July 1, 1975	Design public hearing held
September 1, 1975	Design approval from FHWA
January 1, 1977	Field surveys complete
November 1, 1977	Right of way plans complete

This schedule was arrived at after consultation with Mr. R. W. McGowan. He stresses that it is the very minimum amount of time required for each phase and would require a first order priority being assigned all phases of the project.

In summary, the "intermediate" location has some advantages over the US 301 alternative; however, it also has disadvantages. When compared to the "bypass" location it only has one advantage, reducing the effect on wildlife, against many disadvantages. Therefore, considering the above and the time delay in advancing the "intermediate" location to the position of the "bypass," it is *not* recommended that further consideration by given to this alternative.

FRP/gs

cc: Mr. R. W. McGowan
Mr. W. F. Caddell, Jr.
Mr. W. A. Wilson, Jr.
Mr. N. H. Wiley
Mr. N. A. Day